In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 440

CLIVE MICHAEL BOUTILIER, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

* * * * *

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Pet. App. A, pp. 12–33) are not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 34) was entered on July 8, 1966. The petition for a writ of certiorari was filed on August 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 212(a)(4) of the Immigration and Nationality Act of 1952, which excludes from ad-

mission into the United States aliens "afflicted with psychopathic personality," is void for vagueness as applied to homosexuals.

2. Whether the evidence was insufficient because there was no medical examination of petitioner by the United States Public Health Service.

STATUTES INVOLVED

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U.S.C. 1182(a)(4), provides in pertinent part:

> Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens * * * shall be excluded from admission into the United States:
>
> * * * * *
>
> (4) Aliens afflicted with psychopathic personality * * *;
>
> * * * * *

Section 241(a)(1) of the same Act, 66 Stat. 204, 8 U.S.C. 1251(a)(1), provides in pertinent part:

> Sec. 241. (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> * * * * *

STATEMENT

Petitioner, a 33-year-old native and citizen of Canada, was admitted to the United States for permanent residence on June 22, 1950 (R. II, 13a–14a).[1] In

[1] The record filed with the Clerk of this Court consists of petitioner's appendix (R. I) and respondent's appendix (R. II) below.

September 1963, he submitted an affidavit to a naturalization examiner as a part of an application to file a petition for citizenship. He stated therein that he had been arrested in New York in October 1959 on a charge of sodomy.* Upon the request of the Immigration Service for further information, petitioner in January 1964 submitted a sworn statement to an immigration officer to the effect that he had engaged in voluntary homosexual relations on an average of three or four times a year since the age of sixteen, a period that embraced six years prior to his entry into the United States as well as eight years after entry (R. II, 16a–19a). Petitioner also stated that in December 1957 he had acknowledged being a homosexual on a selective service form and, after examination by a psychiatrist, had been classified 4–F by reason of that condition (R. II, 19a–20a). From 1959 to 1964, petitioner shared an apartment with another man with whom he had occasional sexual relations (R. II, 18a–19a).

Petitioner's sworn statement was forwarded to the United States Public Health Service for an opinion as to whether, on the basis of the statement, there were grounds for concluding that petitioner was excludable from the United States at the time of his entry in 1955. On the information supplied, the Public Health Service certified its opinion that petitioner was afflicted with psychopathic personality

*The charge was eventually dismissed because the complainant failed to appear in court. Petitioner, however, freely stated to the immigration officer that the acts leading to arrest involved anal sodomy and fellatio with a male minor (R. II, 15a).

(sexual deviate) at the time of his admission in June 1955 (R. I, 15a).*

On the basis of the Public Health Service certification and supporting documents, deportation proceedings were instituted on January 28, 1965. Petitioner was alleged to be deportable under Section 241(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(1)) in that he was excludable, by the law existing at the time of his entry (Section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4)), as an alien afflicted with psychopathic personality. At hearings before a Special Inquiry Officer, petitioner declined personal examination by Public Health Service doctors (R. I, 6a; R. II, 7a), electing instead to introduce letters from two private psychiatrists. These letters stated in effect that, although petitioner had engaged in homosexual activities, he was not psychotic or psychopathic (R. I, 16a–19a). It was stipulated that the letter opinions of the two private psychiatrists need not be submitted to the Public Health Service for reconsideration of its findings since, if a Public Health doctor appeared to testify regarding the material, he would testify that petitioner had been a sexual deviate at the time of his entry into the United States, and was properly certified as a psychopathic personality under the pertinent regulations (R. I, 6a–

* Paragraph 6–b of the United States Public Health Service Manual provides that those applicants who are diagnosed as sexual deviates shall be classified in the statutory category "afflicted with psychopathic personality."

7a). Petitioner's counsel agreed that there was no serious contest as to whether or not petitioner was a sexual deviate, but only as to whether he was afflicted with psychopathic personality (R. I, 7a).

The Special Inquiry Officer found that petitioner had been a sexual deviate at his entry and hence excludable as an alien afflicted with psychopathic personality, noting that "[w]hatever the phrase 'psychopathic personality' might mean to the psychiatrists, to the Congress it was intended to include homosexuals and sex perverts." (R. II, 26a). The Board of Immigration Appeals agreed (R. I, 2a–3a) and the Court of Appeals for the Second Circuit (one judge dissenting) dismissed the petition for review (Pet. App. A; R. II, 32a–53a).

DISCUSSION

1. The holding of the court below in this case—that the statutory ban on aliens afflicted with psychopathic personality is not unconstitutionally vague as applied to homosexuals—is in direct conflict with the holding of the United States Court of Appeals for the Ninth Circuit in *Lavoie* v. *Immigration and Naturalization Service*, 360 F. 2d 27, in which the government has filed a petition for a writ of certiorari (No. 513, this Term). As we explain in that petition, the conflict is one which should be settled by this Court. We accordingly do not oppose the granting of certiorari with respect to the constitutional question in the present case.

2. We believe, however, that review of the remaining issues is not warranted. Petitioner's principal

contention is that a medical examination similar to that required for exclusion proceedings is necessary to support a deportation order (Pet. 2, 7-9). Petitioner's argument is based on the assumption that the Immigration Act makes the same procedures applicable to both exclusion and deportation proceedings, but that is not so. For exclusion purposes, the Act (Section 234, 8 U.S.C. 1224) provides for the medical examination of aliens suspected of being excludable as, among other things, afflicted with psychopathic personality.[4] The same provision authorizes an appeal from an adverse medical certification to a board of medical officers. The final certification then goes to an examining immigration officer, who must detain the alien for further inquiry before a Special Inquiry Officer unless it appears "clearly and beyond a doubt" that the alien is entitled to enter. 8 U.S.C. 1225(b). The decision of the

[3] Petitioner's contentions that he was unlawfully deported for post-entry conduct (Pet. 2, 9-10) and that the term "homosexual" is too vague to give meaning to the statute (Pet. 2, 9) are plainly without merit. It is uncontested that petitioner was a homosexual long before his entry into the United States and that the public health certificate was addressed to the time of his entry. While the Special Inquiry Officer credited petitioner's statement concerning his post-entry homosexual activities, it is clear that the deportation order rested on the finding that the disqualifying condition existed at the time of entry. As to the second contention, whatever the force of the void-for-vagueness doctrine as applied to the statutory term "psychopathic personality," the term "homosexual" used by the Service is not vague as applied to this case. It clearly defines the sexually deviant conduct which the evidence showed petitioner engaged in over a number of years prior to his entry and which placed him in an excludable class of aliens.

[4] The procedures for the medical examination are set forth in the Public Health Service's regulations, 42 C.F.R. Part 34.

Special Inquiry Officer must be based solely upon the medical certification, without an inquiry into the underlying factual basis for the determination. 8 U.S.C. 1226(d); see *United States ex rel. Johnston v. Shaughnessy*, 336 U.S. 506, 509.

The deportation procedure under Section 242(b) of the Act (8 U.S.C. 1252(b)) is radically different. It substantially parallels a trial before a judicial tribunal. It is an adversary proceeding in which the government has the burden of proof. The Special Inquiry Officer's decision must be based solely on the evidence produced at the hearing, and he has full authority to try *de novo* all factual questions upon which deportation depends. That was done here. The government proved petitioner to be a sexual deviate who had engaged in homosexual behavior over a long period of time. Petitioner's own psychiatric evidence supported this finding, and his counsel readily conceded that there was no serious contest concerning petitioner's classification as a sexual deviate (R. I, 7a). Moreover, the government expressly offered petitioner an opportunity to take the Public Health Service medical examination he now asserts was required—which he refused (R. I, 6a; R. II, 7a). He should not now be heard to complain that the record is deficient in this regard.

CONCLUSION

For the foregoing reasons, we suggest that the petition for a writ of certiorari be granted (together with the government's petition in *Lavoie*), limited,

however, to the constitutional question whether the statutory term "psychopathic personality" is void for vagueness as applied to homosexuals.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

SEPTEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966